Office-Supreme Court, U.S.
FILED
FEB 16 1966
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 1025

ROYAL COURT APARTMENTS, INC.,

*Petitioner,*

v.

THE UNITED STATES,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

CARL L. SHIPLEY
1204 National Press Building
Washington, D.C. 20004
*Attorney for Petitioner*

*OF COUNSEL:*

Shipley, Akerman & Pickett
1204 National Press Building
Washington, D.C. 20004

# INDEX

OPINION BELOW . . . . . 1
JURISDICTION . . . . . 2
QUESTIONS PRESENTED . . . . . 2
STATUTES AND RULES INVOLVED . . . . . 3-4
STATEMENT . . . . . 4
REASONS FOR GRANTING THE WRIT . . . . . 13
CONCLUSION . . . . . 20
APPENDIX:
Opinion Below (November 19, 1965) . . . . . 1a

## CITATIONS

CASES:

Commissioner v. Sunnen, 333 U.S. 591 . . . . . 18
FHA v. Burr, 309 U.S. 424 . . . . . 16, 17
National City Bank of New York v. Republic of China, 348 U.S. 356 . . . . . 17
North Dakota-Montana Wheat Growers Association v. United States, 66 F.2d 573 . . . . . 14, 16
United States v. Aleutian Homes, Inc. 193 F. Supp. 571 . . . . . 16
United States for Use of Mutual Metal Manufacturing Co. v. Biggs, D.C. 46 F. Supp. 8 . . . . . 15, 16
United States v. Joseph Behr & Sons, D.C. 110 F. Supp. 286 . . . . . 15
United States v. Boris, D.C. 122 F. Supp. 936 . . . . . 15
United States v. King, 119 F. Supp. 404 . . . . . 16
United States v. Lauer, D.C., 45 F. Supp. 670 . . . . . 15
United States v. Nipissing Mines Co., Second Circuit, 206 F. 431 . . . . . 15
United States v. Royal Court Apts., Inc., Civil Case No. 4449 T, USDC, Middle Dist. Fla., Tampa Div. . . . . 10, 13
United States v. Shaw, 309 U.S. 495 . . . . . 16, 17

[ TABLE OF CASES, continued]

United States v. Silverton, First Circuit, 200 F.2d 84 . . . . . 16

United States v. Skinner and Eddy, Ninth Circuit, 35 F.2d 889 . . . . . 16

United States v. Stephanidis, D. C. 41 F.2d 958 . . . . . 16

United States v. United States Tin Corporation, 148 F. Supp. 922 . . . . . 15

United States v. Waylyn Corp., 130 F. Supp. 783, *aff'd*, 231 F.2d 544, *cert. den.*, 352 U.S. 827 . . . . . 16, 17

STATUTES INVOLVED:

28 U.S.C. 1346 . . . . . 14, 15, 16, 17, 18
28 U.S.C. 1491 . . . . . 19

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 13 (a) and (d) . . . . . 14, 16, 17, 18, 19

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

---

No.

---

ROYAL COURT APARTMENTS, INC.,

*Petitioner,*

v.

THE UNITED STATES,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

---

Carl L. Shipley, attorney for Royal Court Apartments, Inc., petitioner herein, respectfully requests in behalf of said petitioner, that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Claims in the above entitled case.

## OPINION DELIVERED IN THE COURT BELOW TO BE REVIEWED

The opinion delivered in the United States Court of Claims is No. 44-64, decided November 19, 1965, and is set out *infra* in the appendix hereto at page 1a.

## JURISDICTION

As grounds on which to invoke jurisdiction of this Court, petitioner relies upon 28 U.S. Code 1255, and alleges and verily believes that the special and important reasons justifying a grant of review on writ of certiorari in the sound judicial discretion of this Court within the meaning of Rule 19 are:

1. The opinion of the court below decides an important question of federal law which has not been, but should be, settled by this Court, to wit, whether petitioner's claim for money damages in the sum of $855,577.58 for breach of a contract implied in fact between petitioner and the Federal Housing Administration or, in the alternative, for a taking of its property for public use without just compensation in violation of the Fifth Amendment, is barred by the doctrine of *res judicata* on alleged grounds that all of petitioner's claim could and should have been presented in defense of a foreclosure action in the United States District Court of Florida brought by the United States against petitioner.

## QUESTIONS PRESENTED FOR REVIEW

1. Is a money claim for damages for breach of contract implied in fact asserted under the Tucker Act in the United States Court of Claims against the United States, or, in the alternative, a claim for money damages for a Fifth Amendment taking of property for public use, barred by the doctrine of *res judicata* on the assumption that all of said claim could and should have been presented in defense of a foreclosure action by the United States against claimant in the United States District Court?

2. Is a claim which is properly justiciable in the United States Court of Claims against the United States compulsorily required to be asserted as a counterclaim in a foreclosure proceeding by the United States in a United States District Court?

3. Must a money claim against the United States in excess of $10,000.00 and properly justiciable in the United States Court of Claims be asserted as a counterclaim against the United States in a foreclosure proceeding by the United States against claimant in the United States District Court?

4. Has the United States waived its sovereign immunity and consented to suits against it for money claims in excess of $10,000.00 in the United States District Court, when such claim is asserted as a counterclaim in a foreclosure action initiated by the United States against the claimant?

## STATUTES INVOLVED

**28 U.S.C. 1346**

"(a) The District Court shall have original jurisdiction, concurrent with the Court of Claims, of:

"* * * (2) Any other civil action or claim against the United States, not exceeding $10,000.00 in amount, founded either upon the Constitution, or upon any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in court."

**28 U.S.C. 1491**

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

(1) Founded upon the Constitution; or
(2) Founded upon any Act of Congress; or
(3) Founded upon any regulation of an executive department; or
(4) Founded upon any express or implied contract with the United States; or
(5) For liquidated or unliquidated damages in cases not sounding in court."

## RULES INVOLVED

**Federal Rules of Civil Procedure**

Rule 13(a)

"A pleading shall state as a counterclaim * * * if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim * * *."

Rule 13(d)

"These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims * * *."

## STATEMENT OF CASE

On February 24, 1964, petitioner filed suit in the United States Court of Claims against the United States for damages in the sum of $855,577.58 for breach of an agreement implied in fact by the Federal Housing Administration and the United States to modify a mortgage which it held on a 168-unit multifamily rental housing project at St. Petersburg, Florida, and for arbitrary and capricious refusal by the Federal Housing Administration and the United States to adjust the terms of said mortgage in order to maintain the competitive market position and afford protection against decreased earnings, in accordance with the undertaking of the Federal Housing Administration on which petitioner relied in building and operating said project. The complaint filed in the United States Court of Claims is as follows:

## PETITION

1. On December 14, 1946, President Truman, in White House release No. 936, signed by Charles G. Ross, Secretary to the President, promulgated a Veterans Emergency Housing program with the stated "objective of rapidly and adequately housing our veterans." He announced:

"* * * We are planning financing and other aids that will encourage builders to produce units for

rent. * * * More family units must be made available for rent to veterans. * * * The great bulk of this task will fall upon private enterprise. * * * We also plan a number of financial measures that will encourage the construction of rental housing. * * * To provide assurance of continued insured mortgage financing to builders who are planning rental housing, I am making available to the FHA the second billion dollars of Title VI insurance authorization * * *. This is to be used primarily for rental housing, together with the largest possible share of the first billion dollars directly authorized by Congress. * * * Qualified FHA personnel * * * will be made available to help private sponsors plan rental projects and to expedite processing for insured financing commitments.

"The FHA is simplifying procedures and broadening eligibility standards which will expand the field of its operation in rental housing. * * * To remove uncertainty over adequacy of insured financing commitments for rental projects, the Federal Housing Administration will develop a procedure for review and amendment of commitments issued in advance of construction.

"To reduce monthly payments and to make possible lower rents, the FHA will extend the term of amortization in its Title VI rental housing commitments beyond the usual 28 years, the amount of extension to be appropriate for the project proposed.

"To guard against the possibility of lesser earnings of housing projects, after the emergency is met, the FHA will work out with concurrence of lending institutions a set of regulations permitting the adjusting of mortgage terms at subsequent periods in the life of the project."

2. On December 24, 1956, in release No. NH 72604, the FHA announced a reduction in monthly carrying charges on financing of apartment houses. FHA Administrator Foley stated:

"I am confident these steps will help stimulate rental housing development in 1947. * * * Other administrative aids, not requiring legislation, designed to encourage builders in the rental field will be announced as they are determined."

The announcement also stated that the action by the FHA reduced the monthly principal curtailment on mortgages insured under Section 608 of Title VI by changing the minimum required initial principal payment on a level annuity basis from 2% to 1 1/2% of the original face amount of the mortgage.

3. On January 2, 1947 in FHA release No. 72673 FHA Administrator Foley sent a directive to all FHA field offices calling attention to the statements of President Truman on the housing program, and setting forth new policy procedures, one of which was entitled "Adjustment of Section 608 Mortgage Terms", which provided,

> "So that housing projects constructed under the present emergency conditions may continue to maintain their competitive market position after the housing shortage is met, the FHA will, in collaboration with lending institutions, give consideration to a readjustment of project mortgage terms where it is deemed necessary."

Said directive also instructed FHA field offices to undertake rehabilitation of large apartment buildings and other structures as an added tool in solving the rental housing problem.

4. In an additional FHA release No. 73142 in January 1947 the industry itself was notified that

> "New incentives, speedier action, and increased financial stability are offered builders and sponsors of rental housing projects by recent changes in FHA procedures and policies.
>
> "These changes, all designed to encourage more construction of housing for rent under conditions of greater security, consist of a series of actions over a period of several months. * * * Recent changes in FHA procedures and in other matters affecting rental housing of interest to the builder and the investor, follow: * * * *Mortgage Review*. In collaboration with lending institutions, FHA will give consideration to readjustment of mortgage terms if necessary in the future in order to enable projects built under present emergency conditions to maintain their compet-

itive market position and afford protection against decreased earnings."

5. In 1948, at the urgent suggestion of the Jacksonville Florida FHA office that something be done to relieve the wretched housing conditions for Negroes in St. Petersburg, Florida, plaintiff undertook sponsorship and construction of a Section 608 project designed for Negro occupancy. In reliance on the announced FHA policy of encouragement to provide builders of rental housing and the FHA undertaking to readjust mortgage terms where necessary to protect against decreased earnings, Royal Court Apartments, Inc., was organized as a sponsor in 1949, in accordance with the provisions of Section 608, Title VI, of the National Housing Act.

6. On May 30, 1949, the Federal Housing Administration, using FHA Form No. 2264-W, signed by R.R. Stanley, Chief FHA Underwriter, the FHA completed a project analysis under Section 608 of the Act for a project to be known as Royal Court, Project No. 067-42011, located at 16th Street, between Third and Fifth Avenues, St. Petersburg, Florida, to consist of two-story row house construction, containing 16 buildings, and a total of 168 rentable family apartment units designed primarily for Negro occupancy. Said project analysis provided for estimated net income of $59,316 per year after operating expenses and taxes.

7. FHA insisted that the Royal Court project be constructed of separate dwelling units in all respects, including party fire-walls, so that the individual units could later be sold off under separate FHA mortgages to prospective homeowners. FHA officials indicated and recognized the desirability of having Negroes attain home ownership, in order to take advantage of the $5,000 homestead exemption for real estate taxes allowed homeowners in Florida.

8. On July 5, 1951, the State of Florida Hotel Commission advised plaintiff that in reliance upon the FHA agree-

ment to accept separate mortgages on any one or more of the individual apartment units in the Royal Court project, which might be sold separately at a later date, said project was exempted from jurisdiction of the State Hotel Commission over apartment houses, in that each dwelling unit was complete in itself and consisted of a first and second floor, separate entrance at front and rear, separate heating facilities, separate chimney, that no unit was dependent on any other unit for any service facility, and there were no common lobbies or hallways.

9. In further reliance upon the FHA undertaking to protect the project against decreased earnings and changed economic and competitive conditions, and the FHA undertaking to permit sale of individual units to individual owners, plaintiff undertook and completed construction of Royal Court apartments in 1949 and 1950.

10. On September 5, 1951, FHA violated its agreement to permit sale of individual units, and refused plaintiff's request for separate individual sales, stating that the St. Petersburg FHA office had advised the Washington office, "that among other reasons it is their opinion that the property would not lend itself to single family dwellings, which would, therefore, not permit us to re-insure the separate mortgages." Upon inquiry, plaintiff learned that the FHA's reason for such action was its unwillingness to have 168 separate Negro mortgages, despite its encouragement of plaintiff to undertake construction and operation of a project designed for Negro occupancy, and agreement to permit sale of the individual units to these citizens to encourage home ownership.

11. As a result, Royal Court Apartments continued to bear the high Florida tax rate on non-home properties, which is intended to fall upon tourists and transients and compensate for revenue losses resulting from the $5,000 homeowner real estate tax exemption under the Florida homestead law. As a further result, plaintiff was bur-

dened with operating expenses and taxes which pushed economic rents beyond the capacity to pay off the low income minority group for whose benefit the project was built.

12. Thereafter, at various periods during 1951 through 1957, FHA violated its undertaking to meet changed economic conditions by refusing to release plaintiff's own funds accumulated in a replacement reserve fund held by Stockton, Whatley, Davin & Company, First Avenue and Sixth Street, North, St. Petersburg, Florida, servicing agent for New York Life Insurance Company, the mortgagee.

13. Economic conditions steadily worsened, and a large percentage of Royal Court tenants were out of work, since they were members of the Negro community and largely among the group of unskilled workers swelling the unemployment ranks in recent years. Numerous tenants who had wanted to buy the individual family units in Royal Court and could not do so, moved out to purchase FHA-sponsored single family dwellings in other areas of St. Petersburg.

14. On May 1, 1962, FHA finally notified plaintiff that commitments for sale of single apartment units would be permitted under Section 203 of the National Housing Act, but with a selling price limit of $6,950 for inside units and $7,250 for corner units, and demanded that $1,957 be spent by plaintiff per unit for rehabilitation, reducing the amount plaintiff would receive to under $5,000, which sum would further be reduced by financing costs such as mortgage discount, in addition to sales expense, which would have totalled $700 together with the sales commission of 5%, which, in effect, would have reduced the net sum receivable from the sale of these units by plaintiff to under $4,000. Since the mortgage balance due was approximately $4,600 per unit, plaintiff could not possibly undertake the FHA-approved program. The FHA proposal was a sham.

15. Thereafter, FHA made subsequent additional proposals which would have required plaintiff to pay substantial sums for deferred maintenance and defaulted mortgage payments, all of which FHA knew were beyond plaintiff's financial capacity, and were all in violation of FHA's original undertaking to readjust mortgage terms to meet changed economic conditions and to protect against decreased earnings as outlined hereinabove.

16. On and after January 1, 1962, plaintiff was unable to develop enough cash from operations to meet mortgage payments, and the mortgage was in default. Royal Court had a 4% FHA insured mortgage, and during the years intervening since 1949, mortgage rates had gone up, with the result that the mortgagee, New York Life Insurance Company, was interested in assigning the mortgage to the FHA in return for debentures. Under the Act FHA could exchange debentures for a defaulted insured mortgage, and it had so agreed with New York Life in this case. New York Life could use said debentures as the equivalent of cash to pay mortgage insurance premiums on other FHA properties, and free cash to lend at a higher interest rate. The FHA at no time met its commitment to plaintiff to work with the mortgagee in readjusting mortgage terms to protect against decreased earnings.

17. On or about February 28, 1962, assignment of the mortgage to FHA by New York Life Insurance Company was completed as outlined hereinabove, and thereafter the FHA was the mortgagee with full power to readjust mortgage terms to meet the changed conditions, in accordance with its original undertaking. Despite numerous requests by plaintiff, FHA consistently refused to do so. On March 15, 1962, the FHA undertook foreclosure proceedings against Royal Court, which finally culminated in the entry of a judgment on March 29, 1963, in a case entitled *United States of America v. Royal Court Apartments, Inc.*, Civil Case No. 449 T, U.S. District Court, Middle District of Florida, Tampa Division. Said judgment was in the sum of $752,030.97, plus interest at 4%

from July 12, 1962, to date of foreclosure sale and costs, plus $100 redemption price on 5 shares of preferred stock, plus dividends due.

18. On May 6, 1963 said foreclosed property was sold at public auction to FHA Commissioner Philip N. Brownstein for the sum of $250,000, and the amount of said bid was applied to the indebtedness of Royal Court Apartments, Inc.

19. Thereafter plaintiff assessed costs in the sum of $53.20, U.S. Marshall expenses in the amount of $3,831.-00 interest in the sum $24,598.68, making a total due the United States, under the mortgage, as of May 6, 1963, of $776,629.65. After application of the bid amount of $250,-000 to the amounts due to plaintiff, there remained a balance due of $526,629.65, which was ultimately entered as a deficiency decree on January 13, 1964.

20. The original cost of Royal Court Apartments, Inc. to plaintiff was $1,090,970.50, of which the original amount of the mortgage was $951,000, leaving an investment by plaintiff in the project of $139,970.50.

21. Thereafter, between the years 1950 and 1962, plaintiff made capital improvements amounting to $18,579.17, and mortgage principal payments of $196,704.18, making a total investment of $355,253.85. During said period, plaintiff received a return of capital in the amount of $26,305.27, leaving a capital investment of $328,948.58.

22. As a result of the failure of the FHA to abide by its undertaking to readjust said mortgage to meet changed economic conditions and to protect against decreased earnings, and as a result of the refusal of the FHA to approve withdrawals from plaintiff's accumulated replacement reserve fund, and as a result of the refusal of the FHA to permit plaintiff to sell individual family units with individual mortgages under Section 203 of the National Housing Act, in accordance with FHA's original agreement, and as a result of the FHA's refusal to grant time-

ly rent increases to meet increased operating expenses and taxes, and, as a result of the FHA's refusal in any way to implement or carry out its policies, undertakings and agreements in connection with the sponsor and operation of the Royal Court Apartments, said project was incapable of meeting payments due under the terms of the mortgage, which led to its ultimate foreclosure and the loss of plaintiff's equity.

23. Thereafter, plaintiff was assessed a deficiency of $526,629, which, together with plaintiff's original investment, makes plaintiff's total loss $855,577.58, all of which is the direct and immediate result of actions by the FHA, as outlined hereinabove, which were so arbitrary, capricious and erroneous as to imply bad faith.

WHEREFORE, plaintiff demands judgment against defendant in the sum of $855,577.58.

Respectfully submitted,

Carl L. Shipley
*Attorney for Plaintiff*
1366 National Press Building
Washington 4, D. C.

*OF COUNSEL:*

Shipley, Akerman & Pickett
1366 National Press Building
Washington 4, D. C.

On February 16, 1965, the United States moved for judgment on the pleadings on the grounds that the cause of action, if any, stated in the complaint, was *res judicata*, or, in the alternative, was barred by the principle of collateral estoppel.

On November 19, 1965, the United States Court of Claims issued an Order holding,

> "* * * it is concluded that plaintiff's claim is barred by the doctrine of *res judicata* since all of plaintiff's claim could and should have been presented in defense of the foreclosure action, and,

> "IT IS ORDERED that defendant's motion for judgment on the pleadings be and the same is granted and plaintiff's petition is dismissed."

The opinion and order of the court below was based on the argument asserted in the government's motion for judgment on the pleadings that petitioner's claim in the United States Court of Claims was barred by a judgment entered on March 29, 1963 in *United States of America*, Plaintiff v. *Royal Court Apartments, Inc.*, Defendant, civil action No. 4449 T, United States District Court, Middle District of Florida, Tampa Division. Said mortgage foreclosure judgment resulted from an action by the United States foreclosing petitioner's equity of redemption under said mortgage, and was based upon the inability and failure of petitioner to meet mortgage principal and interest payments in accordance with the terms of the mortgage. Petitioner did not assert as a counterclaim in said mortgage foreclosure proceeding its claim against the Federal Housing Administration and the United States for a breach of contract referred to hereinabove, since 28 U.S.C. 1346 bars money claims against the United States in the United States District Court for sums in excess of $10,000.00, and, in any event, the breach of contract claim did not appear to be a part of the transaction within Rule 13, F.R.C.P.

## ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT

On its face petitioner's claim in the United States Court of Claims set forth hereinabove was for the sum of $855,577.58, an amount far in excess of the statutory limitation of $10,000.00 provided in 28 U.S.C. 1346, which gives concurrent jurisdiction with the U. S. Court of Claims to the United States District Court of

> "[A]ny other civil action or claim against the United States, not exceeding $10,000.00 in amount founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department,

> or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in court."

Rule 13 of the Federal Rules of Civil Procedure provides in terms that

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim * * *."

However, Rule 13 specifically provides in sub-paragraph (d)

> "These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof."

This plain language would seem to make it clear that the United States District Court, even assuming that petitioner's money claim against the United States arose "out of the transaction or occurrence" that was the subject of the foreclosure, was barred from jurisdiction of the counterclaim for lack of consent to suit by the United States under the $10,000.00 limitation of 28 U.S.C. 1346. Indeed, many courts have taken this view. In *North Dakota-Montana W.G. Association v. United States*, 66 F.2d 573, the court said:

> "The set-off presented here as a counterclaim is a suit against the United States, and, the United States not being subject to suit without permission, a pertinent inquiry arises as to just how, when, and where the United States has granted permission that such a suit may be brought against it in the United States District Court. * * * Title 28 USCA provides: 'concurrent with the Court of Claims, of all claims not exceeding $10,000.00 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, * * * in respect to which claim the party would be entitled to redress against

> the United States, either in a Court of Law, equity, or admiralty, if the United States were suable, set-offs, counterclaims, claims for damages, * * * This is not sufficient permission for this action, as the counterclaim sought here to be set off against the Government amounts to some $26,000.00. The extent to which the United States has consented to be sued in its District Court by way of counterclaim or otherwise is fixed by the foregoing statute at $10,000.00.'"

In *United States v. United States Tin Corporation*, 148 F. Supp. 922, the United States brought a foreclosure action on real and chattel mortgages executed by the defendant corporation as security for certain promissory notes in a sum in excess of $2.7 million. The Government's motion to dismiss counterclaims amounting to several million dollars was granted on grounds that jurisdiction to entertain the counterclaim could only be conferred upon the United States District Court by provisions of the Tucker Act, as amended, 28 U.S.C. 1346, which limits original and concurrent jurisdiction to claims not in excess of $10,000.00. In that case the court observed that decisions of the federal courts are in conflict as to the application of this permissive statute respecting counterclaims. As stated by the court:

> "Some hold that the court lacks jurisdiction to entertain such. *U. S. v. Nipissing Mines Co.*, Second Circuit 206 F. 431; *U. S. v. Lauer*, D. C. 45 F. Supp. 670; and other District Court decisions follow the *Nipissing* rule. Others hold that no affirmative relief or judgment may be entered against the United States under such Act. *U. S. For Use of Mutual Metal Manufacturing Co. v. Biggs*, D. C., 46 F. Supp. 8; *U. S. v. Joseph Behr and Sons*, D. C. 110 F. Supp. 286; *U. S. v. Boris*, D. C., 122 F. Supp. 936. A more liberal view is adhered to in a majority of the more recent decisions, holding that in an action by the Government for the amount due the United States, the defendant may set up by way of defense or counterclaim an amount owing to him for breach of warranty or other breach of a contract obligation, to the extent at least of applying such as a set-off, which rule has been recognized and adopted in this

> jurisdiction. *U. S. v. Stephanidis*, D. C. 41 F.2d 958; *U. S. v. Silverton*, First Circuit, 200 F.2d 84; *U. S. v. Biggs*, supra; *North Dakota-Montana Wheat Growers Association v. U. S.*, Eighth Circuit, 66 F.2d 573; *U. S. v. Skinner and Eddy*, Ninth Circuit, 35 F.2d 889; *U. S. v. King*, supra, 119 F. Supp. 404. However, I find no authority for the allowance of any such counterclaim beyond the jurisdictional limit of $10,000.00 * * *."

In *United States v. Shaw*, 309 U.S. 495, this Court reviewed the background of immunity of suit against the United States and indicated that no congressional action modifying the rule in favor of cross-actions "beyond the amount necessary as a set-off" had been taken and reversed a judgment of a lower court allowing a claim in a probate proceeding in a court of the State of Michigan exceeding the $10,000.00 limit. Petitioner's claim herein, similar to the claim asserted in *United States v. Shaw, supra*, clearly falls within those barred by 28 USC 1346 and Rule 13(d), Federal Rules of Civil Procedure, as distinguished from a claim of the sort reviewed by this Court in *Federal Housing Administration v. Burr*, 309 U.S. 242. In *United States v. Aleutian Homes, Inc.*, 193 F. Supp. 571, the Housing and Home Finance Agency brought an action to foreclose certain trust deeds covering housing projects, and counterclaims by the defendants were dismissed on grounds the United States and its agencies could not be sued without consent, and *FHA v. Burr, supra*, and other cases of this Court involving Government-created corporations, are distinguished as not being suits against the United States. However, in all fairness, it must be said that the confusion between *FHA v. Burr, supra*, and subsequent decisions referred to hereinabove, has been some what compounded by the decision in *United States v. Waylyn Corp.*, 130 F. Supp. 783, *aff'd*, 231 F.2d 544, *cert. denied*, 352 U.S. 827, wherein great reliance is placed on Rule 13(d) of the Federal Rules of Civil Procedure as a bar to counterclaims against the United States in excess of the $10,000.00 limit provided in 28 USC 1346. Like the

*Burr* case, the *Waylyn* case was an FHA foreclosure proceeding in which the defendant's counterclaim was barred.

At best, the law is unsettled, and in a state of utter confusion as to whether petitioner herein could have under any circumstances asserted as a counterclaim its claim against the United States for money damages in excess of $855,000.00 as set forth hereinabove. In a variety of efforts to follow, distinguish, and interpret this Court's decision in *FHA v. Burr, supra, United States v. Shaw, supra, National City Bank, New York v. Republic of China,* 348 U.S. 356, and a variety of cases cited in the *Waylyn* decision, *supra,* the law with respect to permissive counterclaims is, to say the least, unsettled and unclear.

A second vital question which is just as unsettled and unclear, is the extent to which Rule 13, Federal Rules of Civil Procedure, repeals, negates, or conflicts with 28 USC 1346. The statute speaks in terms of "concurrent" jurisdiction of the United States District Court and the United States Court of Claims, leaving to the choice of the claimant the forum in which he will assert his claim. There is nothing in either the Tucker Act or any other law which would indicate that either the U. S. Court of Claims or the U. S. District Court has original and exclusive jurisdiction. The operation of Rule 13(a), Federal Rules of Civil Procedure, would seem to be limited to requiring the assertion on a compulsory basis of counterclaims not justiciable in the United States Court of Claims, but arising out of the same transaction.

The decision and opinion of the court below is in complete and total conflict with the decisions of this Court respecting *res judicata.* In dismissing plaintiff's claim, the United States Court of Claims stated:

> "It is concluded that plaintiff's claim is barred by the doctrine of *res judicata* since all of plaintiff's claim could and should have been presented in defense of the foreclosure action."

Apart from the question of whether petitioner's claim

could have been asserted as a counterclaim in the foreclosure proceeding, and apart from the second question of whether petitioner's claim should have been asserted as a counterclaim in the foreclosure proceeding, which are questions involving the construction of 28 USC 1346 and Rule 13, Federal Rules of Civil Procedure, it would appear that the opinion of the court below is in total conflict with decisions of this Court respecting the doctrine of *res judicata*. The foreclosure proceeding was initiated by the United States against petitioner herein in accordance with the terms of the mortgage securing a note, which note and mortgage were assigned on February 28, 1962 to the Federal Housing Administration under the provisions of the National Housing Act.

The foreclosure proceeding was in substance an equity proceeding by the FHA to foreclosure petitioner's right to redeem the mortgaged estate, all in accordance with provisions of Florida law, at the locus of the real estate involved. In *Commissioner v. Sunnen*, 333 U.S. 591, this Court has defined the scope and nature of *res judicata* as follows:

> "It is first necessary to understand something of the recognized meaning and scope of *res judicata*, a doctrine judicial in origin. The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been liti-

> gated and determined, but only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

Petitioner's claim in the United States Court of Claims which was dismissed in the opinion below, not only involved different parties, but it involved different causes of action. The foreclosure action was an equitable proceeding instituted in behalf of the FHA as the real party in interest to foreclose petitioner's equity of redemption. It did not involve a money claim, and did not involve any issues involving the agreement implied in fact between the FHA and petitioner respecting modification of the mortgage. On the other hand, petitioner's claim in the United States Court of Claims was a money claim for damages arising out of a collateral agreement implied in fact by the FHA to modify and adjust the terms of said mortgage so as to enable the project built under emergency conditions "to maintain" its "competitive market position and afford protection against decreased earnings."

Not only were the issues entirely different, but under the Tucker Act the parties were necessarily different, since only the United States can be named as a defendant in the United States Court of Claims.

For the reasons set out hereinabove, petitioner respectfully submits that the opinion below not only decides an important federal question in a way not consistent with decisions of this Court, but wrongly decides an important federal question respecting Rule 13, Federal Rules of Civil Procedure, 28 USC 1346, and 28 USC 1491.

WHEREFORE, the premises considered, it is respectfully submitted that this petition for writ of certiorari should be granted.

Carl L. Shipley
1204 National Press Building
Washington, D. C. 20004
*Attorney for Petitioner*

*Of Counsel:*

Shipley, Akerman & Pickett
1204 National Press Building
Washington, D. C. 20004

# APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 44-64

ROYAL COURT APARTMENTS, INC.

v.

THE UNITED STATES

## ORDER

This case comes before the court on defendant's motion for judgment on the pleadings. Upon consideration thereof, together with the opposition thereto, and without oral argument, and on the basis of the decision by this court in its order of October 30, 1964, in Mildred Tutty v. United States, Ct. Cl. No. 220-63, it is concluded that plaintiff's claim is barred by the doctrine of res judicata since all of plaintiff's claim could and should have been presented in defense of the foreclosure action, and,

IT IS ORDERED that defendant's motion for judgment on the pleadings be and the same is granted and plaintiff's petition is dismissed.

BY THE COURT

NOV 19 1965

Wilson Cowen
Chief Judge